No.....

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

WILLIAM I. PHILLIPS,

*Appellant,*

vs.

MANUFACTURERS TRUST COMPANY, a corporation, and ALEXANDER LEWIS,

*Appellees.*

## BRIEF OF APPELLEES

*On Appeal from the District Court of the United States for the District of Idaho, Southern Division.*

HON. CHARLES C. CAVANAH, *Judge*

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.....Clerk.

Filed.....

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### STATEMENT

It is difficult to orderly answer Appellant's brief since its POINTS AND AUTHORITIES do not succinctly state the questions involved or required by Rule 24 of this court. We will do our best to divine the points involved and answer accordingly.

### CHRONOLOGICAL STATEMENT

This action was originally commenced in the Ada County Idaho District Court on February 8, 1937 (Tr. 1).

The Ada County Sheriff returned "personal" service on appellee by leaving copy of summons and complaint

with the Ada County Recorder February 8, 1937 (Tr. 7). The Gem County Recorder was similarly served February 10, 1937 (Tr. 8).

Removal to the United States District Court for Idaho, Southern Division, was sought by the appellee on February 27, 1937 (Tr. 13). Bond on removal was filed at the same time (Tr. 17).

Motion to quash service was simultaneously filed by appellee (Tr. 19).

Appellant filed in the State Court its objections to removal March 3, 1937 (Tr. 22). The State Court, on argument of motion to remove, but not on the motion to quash service, ordered removal March 19, 1937 (Tr. 29-30).

After removal appellant moved to remand March 30, 1937, setting forth seven grounds therefor (Tr. 31).

Argument on this motion was had April 14, 1937 (Tr. 42).

An unusual procedure—a removal of motion to remand —was filed April 27, 1937, by appellant (Tr. 47-50). This was argued and denied on May 4, 1937 (Tr. 52).

On June 2, 1937, a Praecipe for default was filed by the Appellant notwithstanding pendency of motion to quash. A deputy Clerk entered default on appellee and co-defendant, Alexander Lewis on June 2, 1937 (Tr. 54).

On June 6, 1937, motion to make the default judgment final was filed without service on appellee (Tr. 54-55).

Later, and on August 6, 1937, appellee moved to set

aside the default (Tr. 55-57). A similar motion was filed for defendant, Alexander Lewis (Tr. 59-65).

These motions were argued on September 13, 1937 and again on September 30th—in this latter argument the motion to quash service in the State Court was also argued (Tr. 66).

On October 5, 1937, the court set aside the default and also sustained the motions to quash service (Tr. 66).

The lower court filed a written opinion on this decision (Tr. 67-70).

The Appellant then on October 21, 1937, filed a motion to reconsider the order overruling the motion to remand (Tr. 74-77), which had been made April 16, 1937 (Tr. 46). On January 5, 1938, the lower court denied this motion (Tr. 80).

Thereafter the appellant attempted service, issuing summons and complaint out of the lower court on February 7, 1938, which was served on the County Recorder of Gem County, Idaho, (Tr. 82).

On February 8, 1938, another summons was issued and served by the Marshall and returned without service (Tr. 85). On the same date appellant filed an affidavit for order to perfect service, and in accordance with that the lower court ordered summons issued (Tr. 86-89).

Then on March 16, 1938, another summons was issued and return showed service on the County Recorder of Gem County with her certificate showing she mailed a copy of summons on February 14, 1938, to defendant, Alexander Lewis, and on March 2, 1938, to defendant,

Manufacturers Trust Company in New York (Tr. 89-92).

On the 23rd day of March, 1938, the appellee moved to quash service of summons and complaint served on February 9, 1938, upon the County Recorder of Gem County, Idaho, (Tr. 93-96).

On April 8, 1938, the appellant moved for a default against the appellee for failure to answer (Tr. 97-98) and on April 16, 1938, the appellee filed a supplemental motion to quash service of summons and complaint in order to include the purported service made on the 2nd day of March, 1938, and also the purported service made on the 5th day of February, 1938 (Tr. 114-117).

On April 22, 1938, the motion to quash service was argued as well as the appellant's motion to enter default—the latter was immediately denied (Tr. 126).

On May 5, 1938, the lower court sustained the motion of defendant, Manufacturers Trust Company, to quash service of summons and complaint (Tr. 130)—it rendered a written opinion on this occasion (Tr. 127-129).

On June 11, 1938, the appellant moved to remand to the State Court (Tr. 132-133). The court on June 13, 1938, denied the motion and dismissed the case (Tr.133-134).

## POINTS AND AUTHORITIES.

### I.

### THE CASE WAS PROPERLY REMOVED TO THE FEDERAL COURT AND ERROR WOULD HAVE RESULTED HAD IT BEEN REMANDED.

Collins Mfg. Co. v. Wickwire Spencer Steel Co., 11 Fed. (2d) 196.

Gray v. Oregon Short Line R. Co., 37 Fed. (2d) 591.

Herbert v. Roxana Petroleum Corp., 12 Fed. (2d) 81.

Groton Bridge & Mfg. Co. v. American Bridge Co., 137 Fed. 284.

II.

APPELLANT CLAIMS WAIVER IN THE STATE COURT BY APPELLEE SUBMITTING THE QUESTION OF VALIDITY OF SERVICE.

Central Deep Creek Orchard Co. v. C. C. Taft & Co., 34 Idaho 458, 202 Pac. 1062.

Charis Corporation v. St. Sure, 94 Fed. (2d) 353 (9 CCA).

Hardness v. Hyde, 98 U. S. 476, 25 L. Ed. 237.

Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522, 75 L. Ed. 1244.

Cyc. of Federal Procedure, Sec. 1229, p. 549.

III.

AFTER REMOVAL DEFAULT FOR FAILURE TO APPEAR WAS ENTERED BUT WAS RIGHTFULLY SET ASIDE BECAUSE THE APPELLEE'S MOTION TO QUASH SERVICE FILED IN THE STATE COURT WAS PENDING AND WHILE THAT MOTION DID NOT CONSTITUTE GENERAL APPEARANCE IT WAS SUFFICIENT APPEARANCE TO PREVENT DEFAULT.

Central Deep Creek Orchard Co. v. C. C. Taft & Co., 34 Idaho 458, 202 Pac. 1062.

Dahlgren v. Pierce, 263 Fed. 841.

Cain v. Commercial Pub. Co., 232 U. S. 124, 58 L. Ed. 122.

Garvey v. Compania Metaulurgica Mexicana, 222 Fed. 732.

Higgins, et al. v. California, etc. 299 Fed. 810.

Cyc. of Federal Procedure, vol. 2, p. 211.

Bramwell v. Owen, 276 Fed. 36.

Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517.

Rorick v. Stilwell (Fla.) 133 So. 609.

McGinness v. McGinness, 68 Atl. 768 (N. J.)

Virginia Joint Stock Land Bank v. Kepner, 7 N. E. (2d) 562 (Ohio).

IV.

THE APPELLANT CONTENDS THAT APPELLEE WAS PROPERLY SERVED AND THEREFORE THE FEDERAL DISTRICT COURT ERRED IN QUASHING THE SERVICE.

Simon v. Southern R. Co., 236 U. S. 115, 59 L. Ed. 492.

Old Wayne Mutual Life Assn. v. McDonough, 204 U. S. 8, 51 L. Ed. 345.

Chipman v. Jeffery Co., 251 U. S. 373, 64 L. Ed. 314.

Toledo R. & Light Co., v. Hill, 244 U. S. 49, 61 L. Ed. 982.

Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 1113.

Golden, et al. v. Connersville Wheel Co., 252 Fed. 904.

Patterson et al. v. Shattuck Arizona Carpet Co., 210 N. W. 621.

Bank of America v. Whitney Bank, 261 U. S. 171, 67 L. Ed. 594.

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333, 69 L. Ed. 634.

Creager v. P. F. Collier & Son, Inc., 36 Fed. (2d) 783.

Boise F. Service v. General M. Accept. Corp., 55 Idaho 5, 36 Pac. (2d) 813.

Hurley v. Wells-Newton Nat. Corp. (D.C.), 49 F. (2d) 914, 917.

Eastern Products Corp. v. Tennessee Coal, Iron & R. Co., 170 N. Y. S. 100, 101.

Hansen v. American Security & Trust Co., 144 N. Y. S. 839, 840.

Hexter v. Day-Elder Motors Corp., 182 N. Y. S. 717, 718, 720.

Keokuk & Hamilton Bridge Co. v. Curtin-Howe Corp. (Ia.), 274 N. W. 78, 83 (Syll. para. 3).

Mason v. Red River Lumber Co. (D.C.), 21 F. Supp. 438.

Wollman v. Newark Star Pub. Co., 179 N. Y. S. 899.

## V.

THE APPELLANT COMPLAINS THAT WHEN IT SOUGHT TO REMAND THE CASE AFTER THE MOTIONS TO QUASH HAD BEEN SUSTAINED, THE LOWER COURT DISMISSED INSTEAD OF REMANDING.

28 U. S. C. A., para. 80, sec. 37.

In re Employers Reinsurance Corp. (CCA 5), 82 Fed. (2d) 373; 299 U. S. 374, 81 L. Ed. 289.

Reynolds v. Page, 35 Cal. 296.

MINOR POINTS.

28 U. S. C. A., Section 37, paragraph 80.

Kelly v. Alabama-Quenelda Graphite Co., 34 Fed. (2d) 790.

Hunt v. Pearce, 284 Fed. 321.

Bowles v. H. J. Heinz Co., 188 Fed. 937.

ARGUMENT

I.

THE CASE WAS PROPERLY REMOVED TO THE FEDERAL COURT AND ERROR WOULD HAVE RESULTED HAD IT BEEN REMANDED.

DEFECTIVE BOND.

The rather confusing setup of the appellant's brief causes us to suggest that this point covers the removal procedure and the motion to remand of March 30, 1937, (Tr. 31), and the renewal thereof filed April 27, 1937, (Tr. 47), but does not cover the entirely separate motion to remand made by the appellant on June 11, 1938.

The claimed fault in the bond lies in the failure of the appellee to sign it (Tr. 15). The answer is that the appellee's attorney signed the bond and stated he was so authorized. Later, and before the case was removed, that authority was formerly verified by the appellee (Tr. 26).

If the bond were defective for such a reason, it was subject to amendment.

Collins Mfg. Co. v. Wickwire Spencer Steel Co., 11 Fed. (2d) 196.

Gray v. Oregon Short Line R. Co., 37 Fed (2d) 591.

However, the bond given was ample protection—it

bound the undertaking Surety Company and it was a compliance with the statute even had the appellee not signed it.

Herbert v. Roxana Petroleum Corp., 12 Fed. (2d) 81.

Groton Bridge & Mfg. Co. v. American Bridge Co., 137 Fed. 284.

## II.

## APPELLANT CLAIMS WAIVER IN THE STATE COURT BY APPELLEE SUBMITTING THE QUESTION OF VALIDITY OF SERVICE.

The claim that the State Court considered the motion to quash is simply a misstatement—the State Court never considered that motion—it was not presented to it and was not determined by it (Tr. 29-30). Judge Cavanah so stated in one of his opinions (Tr. 69).

The filing of the motion to quash service of summons and complaint (Tr. 21) was a special appearance and did not constitute submission to the State Court's jurisdiction.

Central Deep Creek Orchard Company vs. C. C. Taft & Co., 34 Idaho 458, 202 Pac. 1062:

"While a motion to set aside a judgment, which is invalid for want of jurisdiction of the person of the defendant, based solely on such lack of jurisdiction, does not operate as a general appearance or cure the defect of jurisdiction, yet the authorities are agreed that a motion which proceeds not only on the ground of want of jurisdiction of the person, but joins therewith any nonjurisdictional ground, is a general appearance * * *. A motion in a cause based wholly on

an alleged want of jurisdiction is not an appearance generally, or waiver of any irregularity in the proceedings by which a party is attempted to be brought into court * * *.

The substance of appellant's motion, and the character of the relief asked for therein, are only to be regarded in determining the question whether its appearance was special or general. It is clear that appellant's sole purpose was to challenge the jurisdiction of the court over it, and the relief sought is in no way inconsistent with a want of such jurisdiction."

Charis Corporation vs. St. Sure, 94 Fed. (2d) 353. (9C.C.A.)

Harkness vs. Hyde, 98 U. S. 476, 25 L. Ed. 237.

Baldwin v. Iowa State Traveling Men's Ass'n., 283 U. S. 522, 75 L. Ed. 1244.

Cyc. of Federal Procedure, Sec, 1229, p. 549.

The Appellant cites the case of Shaw v. Martin, 20 Idaho 168, 117 Pac. 853 (App. br. 22), to the point that a motion to quash is a general appearance. However, in that case the motion to quash also sought a dismissal of the case and prayed that the complaint be stricken from the files. Thus it "demands relief which could only be granted in an action already pending."

The motion here concerned is especially limited to quash the purported service and asks no other relief whatever; it does come within the rule which the Idaho court laid down, and which seems to be followed by many states, that where other relief is sought than the quashing of the summons the court is therefore called upon to do more than determine jurisdiction; the asking for relief which

could only be had by the courts assuming jurisdiction, does waive jurisdictional objection.

In the Idaho case a general demurrer had been filed which waived jurisdiction and it was on this theory that the learned Idaho Justice Ailshie agreed with the majority, although disagreeing as an academic matter with its holding that a motion to quash, even coupled as it was with a prayer for other relief, constituted a general appearance and submission to jurisdiction.

## III.

## AFTER REMOVAL DEFAULT FOR FAILURE TO APPEAR WAS ENTERED BUT WAS RIGHTFULLY SET ASIDE BECAUSE THE APPELLEE'S MOTION TO QUASH SERVICE FILED IN THE STATE COURT WAS PENDING AND WHILE THAT MOTION DID NOT CONSTITUTE GENERAL APPEARANCE, IT WAS SUFFICIENT APPEARANCE TO PREVENT DEFAULT.

Through inadvertance of a Deputy Clerk the default of appellee was entered. The appellee appeared specially and asked that the default be vacated solely on the ground that no jurisdiction existed to enter default because summons had never been served upon appellee (Tr. 55-58). The lower court rendered an opinion holding with the appellee (Tr. 67-72).

The appellant contended that the default was justified notwithstanding the pendency of the motion to quash which had been filed in the State Court and which had

never been presented to or determined by the Federal Court. However, Judge Cavanah clearly held that a motion to quash service was an appearance and prevented default. His opinion above referred to is probably sufficient.

There is ample authority to support this view.

Idaho, in the case of Central Deep Creek Orchard Co. vs. C. C. Taft & Co., supra, had a similar situation and there the court held that the motion to set aside default which presented only the question of jurisdiction was not a general appearance:

> "We think the correct rule, supported by the weight of authority and the better reasoning, is that where there is a proper motion by the defendant pending and undisposed of, it is improper for the plaintiff to take a judgment by default (Atchison, T. & S. F. R. Co. v. Lambert, 31 Okl. 300, Ann. Cas. 1913E, 329, and note at p. 331, 121 Pac. 654), unless the determination of the motion either way could not affect the right of plaintiff to proceed with the cause."

Similar cases are Dahlgren v. Pierce, 263 Fed. 841 and Cain v. Commercial Pub. Co., 232 U. S. 124, 58 L. Ed. 122.

Garvey v. Compania Metaulurgica Mexicana, 222 Fed. 732.

Higgins, et al. v. California, etc. 299 Fed. 810.

Cyc. of Federal Procedure, vol. 2, p. 211.

Bramwell v. Owen, 276 Fed. 36.

Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517.

## The Motion To Set Aside The Default Was Not A General Appearance

Appellant cites Mandel Bros. vs. Victory Belt Co., 15 Fed. (2d) 610 (CCA) (app. br. 24). There the party moving to set aside the default actually offered a defense on the merits and invoked the jurisdiction of the court to consider other matters than the lack of jurisdiction—in fact, invoked the discretion of the court to set aside the default by pleading excusable neglect. Here appellant offers no ground for discretion—merely confines the motion to lack of jurisdiction—in no way asks the court to consider the merits of the case and use its discretion.

Appellant also cites the case of Feldman Investment Co., et al. vs. Conn. General Life Ins. Co., 78 Fed. (2d) 838 (CCA). That case is even further from the point. There before appearance a motion for an extension of time in which to answer was filed—later a stipulation confessing the bill and allowing time to pay the principal, etc. was filed—all before the default. Manifestly no attempt to appear specially and question only the jurisdiction of the Clerk to enter default was concerned, as is the fact here.

The appellee made no effort to attack the judgment on any ground except jurisdictional failure. What else could it do? If it did not move to set aside default judgment against it would result. If the court had no jurisdiction over appellant such judgment would be void, but how could the lack of such jurisdiction be shown if to question the default for that reason thereby admitted jurisdiction?

Other cases which uphold the Idaho rule adopted in the case of Central Deep Creek Orchard Co. v. C. C. Taft & Co., supra, are:

Rorick v. Stilwell (Fla.) 133 So. 609.
McGinness v. McGinness, 68 Atl. 768 (N. J.)
Virginian Joint Stock Land Bank v. Kepner, 7 N. E. (2d) 562. (Ohio).

## IV.

## THE APPELLANT CONTENDS THAT APPELLEE WAS PROPERLY SERVED AND THEREFORE THE FEDERAL DISTRICT COURT ERRED IN QUASHING THE SERVICE.

A number of efforts were made to serve the defendant. The service in the state court was attempted upon the Recorder of Gem County and the Recorder of Ada County. The motion to quash filed in the state court was sustained and as well the motion to reconsider that order. Transcript references:

First motion (Tr. 19-21).
Court's order (Tr. 66).
Motion to reconsider (Tr. 74-77).
Minutes of the court (Tr. 80).
District Court's opinion (Tr. 67-72).

Summons was issued out of the district court February 5, 1938 (Tr. 81) and served on that date by leaving a copy with the Recorder of Gem County. Another summons was issued February 8, returned by the Marshal without service (Tr. 84-85). An affidavit for order to

perfect service filed February 8, and an order for service issued on the same date by the District Judge (Tr. 86-89). Summons issued on the 8th of February was served on the Recorder of Gem County, who sent a copy to the appellee by mail (Tr. 89-91). Motion to quash the service made on the 9th of February, 1938 (Tr. 93-95), supplemented by motion covering purported service on the 2nd of March, 5th of February and the 8th of February (Tr. 114-117).

Whether any service made on the Auditor and Recorder of Gem County or Ada County is sufficient to bring the appellee within the jurisdiction of the District Court is the question involved here.

It is not easy to determine the exact nature of the action as set forth in the complaint (Tr. 15), but at least it is an action in personam and in tort. The wrong committed lies in the assertion that Alexander Lewis fraudulently made an option and agreement in writing in November 1931, representing himself to be the true owner of the mining property, and as a result the plaintiff entered upon the property and made expenditures to his damage. (Tr. 3).

About February 15, 1934, the plaintiff discovered the falsity of the representations and delivered over the property to the defendants on their demand.

The false representations were patently not made within the State of Idaho, and the cause of action, therefore, was one which arose out of fraud in making the false

representations by Alexander Lewis—whether the appellee here took part in the representations is not clear from the complaint.

Judge Cavanah took the view that the alleged cause of action arose outside the State of Idaho (Tr. 127). The complaint alleges that the representations were made November 19, 1931 (Tr. 3). In one of his affidavits appellant states:

> "That the suit and action in this instance is by reason of fraudulent acts committed on or about the 19th day of November, 1931, in which it caused to make and did make void and fraudulent option and lease, and collected royalties upon the premises described in plaintiff's complaint * * *." (Tr. 101).

Appellee was the beneficial owner of the Lincoln group of Mines until February 9, 1932, when it transferred all of its interests to the Huron Holding Corporation, which ever since that time has been the beneficial owner of the property (Tr. 118). The Huron Holding Corporation was not affiliated with or a holding company for the Manufacturers Trust Company, and its stock was independently issued and traded in (Tr. 119). That all of the moneys expended in connection with the operation of the Lincoln Group since the transfer February 9, 1932, have been at the sole expense of and paid by the Huron Holding Corporation and not by the Manufacturers Trust Company (Tr. 119-120). The appellee had no asset or holding in Idaho excepting the beneficial interest in the Lincoln Group (Tr. 121). It acquired that property in the nature of security for a loan to a prospective pur-

chaser (Tr. 121-122). The appellee definitely had no interest in the Lincoln Group and made no expenditures in connection with it after February 9, 1932 (Tr. 124-125).

The appellant from time to time filed affidavits, to which we will make brief reference.

Appellant's affidavit (Tr. 24), a statement of legal conclusion that the appellee is doing business in Idaho—that Lewis is a resident of New York and not a resident of Idaho—upon information and belief the appellee is conducting operations at the Lincoln Group.

Affidavit of James Baxter (Tr. 34-35), simply a statement that employees of the "Lincoln Mines" purchased equipment, and a statement that Berthleson said the equipment was purchased "in the name of one Alexander Lewis, an employee of the Manufacturers Trust, a big corporation in New York, and would be paid for."

Affidavit of Mr. Arnould (Tr. 36-37) to the effect that Berthleson, an employee in the "Lincoln Mines" bought equipment and stated that he acted for Alexander Lewis, an employee of the owner of the property in May, 1933, "the Manufacturers Trust."

Affidavit of J. W. Crowe (Tr. 37) to the effect that electric service was rendered to Alexander Lewis on July 21, 1933.

Affidavit of Truman Joiner (Tr. 40), public accountant, to the effect that Alexander Lewis carried a State Insurance Fund policy.

Affidavit of Robert W. Clark (Tr. 77-79) to the effect that he is a truck driver, delivered timber to the Lincoln Mines, and that a workman, Mr. Turner, said "If they sell the mine I'll be out of a job." Affiant saying, "He meant by 'they,' as nearly as I could learn and understand, the Manufacturers Trust Company."

Affidavit of William I. Phillips (Tr. 86-88), on information and belief alleges that the appellee was doing business in Idaho.

Affidavit of appellant (Tr. 100-104), action was one in tort for damages on account of fraud of appellee and Lewis committed about 19th of November, 1931. A number of immaterial references are made to former testimony of Vice-President of the appellee.

J. A. Jones (Tr. 105), Auditor of the State Insurance Fund, stating that one of its policies covered Alexander Lewis in operation of the Lincoln Mine; certain exhibits attached (Tr. 110-113) showing payments by Smelter Company to Alexander Lewis, endorsed to Manufacturers Trust Company by Lewis, various dates from October, 1932, to April, 1933.

From none of these affidavits does it appear that the appellee was doing business at the time the action was instituted or at the various times service was attempted. Most of the affidavits are entirely beside any point at issue and are mainly conclusions and hearsay. They did not satisfy the lower court that the appellee had any interest in the Lincoln Group or carried on any kind of operations in connection with it after February 9, 1932.

SUBSTITUTE SERVICE ON A COUNTY RECORDER CANNOT BE HAD IN TORT ACTION WHERE THE DEFENDANT IS NOT IN THE STATE AT THE TIME OF SERVICE.

The test in such a case is given in Bank of America v. Whitney Bank, 261 U. S. 171, 67 L. Ed. 594:

> "The sole question for decision is whether at the time of the service of the process defendant was doing business within the district in such manner as to warrant the inference that it was present there."

The rule is well stated in the case of Golden, et al. v. Connersville Wheel Co., 252 Fed. 904, 908, where the court said:

> "In order that proper personal service may be made in a state upon a foreign corporation, it is necessary that such corporation be present in such state at the time of service. As, therefore, the presence of a foreign corporation is manifested only by its carrying on of business there, it must appear, in such a case, that the foreign corporation in question was, at the very time of the service, doing such business in the state where jurisdiction is sought. * * * Service cannot be made an instant prior to the time that the corporation actually begins to do business in the state, so as to show its presence there. Neither can service be made an instant after the corporation has ceased to do business there."

An excellent analysis of cases was made in Creager v. P. F. Collier & Son, Inc., 36 Fed. (2d) 783.

Definitely the Supreme Court has so announced in Old Wayne Mutual Life Assn. v. McDonough, 204 U. S. 8, 51 L. Ed. 345.

> Simon v. Southern R. Co., 236 U. S. 115, 59 L. Ed. 492.

Chipman v. Jeffry Co., 251 U. S. 373, 64 L. Ed. 314.

Toledo R. & Light Co., v. Hill, 244 U. S. 49, 61 L. Ed. 982.

Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 1113.

Patterson et al. v. Shattuck Arizona Carpet Co., 210 N. W. 621.

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333, 69 L. Ed. 634.

Appellant started this case in the state court against Lewis—who was never in Idaho and was never personally served—and against the appellee who was the beneficial owner of the Lincoln Group of Mines until Feby. 1932, but not since. Personal service was not had upon the appellee.

When we look at the complaint, we cannot determine exactly what the cause of action is, but giving it the best appellant claims for it, it is a tort action, seeking a personal judgment against appellee because Lewis mis-represented that he was the owner of the Lincoln Group, whereas he was merely naked title holder or trustee, and appellee was really the owner. Just how fraud occurs in this situation is not clear, but appellant states that he believed Lewis when he represented himself as the true owner. Whereupon, he spent large sums in developing the mine and paid out royalties to Lewis and appellee. Having done this, he found out for the first time February 15, 1934, that Lewis was not the real owner, but that the appellee was the real owner and thereupon he surrendered the premises back to both parties, and without stating why he returned the property or in what man-

ner he was defrauded, he alleges that by reason of the fraudulent option and lease he was damaged in the sum of $500,000.00. These fects, we think, fairly appear in paragraph III of the complaint (Tr. 3-4), paragraph IV (Tr. 4), also from appellant's affidavit (Tr. 101).

When he sued in the State Court, Phillips knew that the appellee was not in Idaho, in that it had no statutory agent here or any officers or employees in Idaho—he knew he was after a personal judgment which would not affect the title or ownership of any property in Idaho, and is held to the knowledge that appellee could not be sued outside of the State of New York—at least not in Idaho unless it were actually in the state, for a personal judgment.

It was certainly obligatory upon the appellant to show if it were true that the fraud claimed was committed by the appellee in Idaho. Otherwise, he could not avoid the rule that contracts or wrongs committed outside the state cannot be sued on in the state where the defendant is not in the state at the time suit is brought and service attempted.

Appellant well knew just where and how the fraud was perpetrated on him and could have alleged in the complaint or subsequent affidavits that the false representations on which the suit is based were made in Idaho and the conspiracy occurred in Idaho if those were the facts—Phillips actually made the contracts. Certainly he was obliged to show affirmatively when the question was raised that he had a right to sue outsiders in Idaho.

*The burden was upon the appellant to show that the lower court had jurisdiction of his claim against appellee.*

The rule is clearly stated in Old Wayne Mutual Life Assn. v. McDonough, 204 U. S. 8, 51 L. Ed. 345. In the above case the Supreme Court held:

> *"The burden of proof was therefore upon the plaintiffs to show by what authority the Pennsylvania court could legally enter a personal judgment against a corporation which, according to the complaint itself, was a corporation of another state, and was not alleged to have appeared in person or by an attorney of its own selection, or to have been personally served with process."* (Italics ours.)

Hurley v. Wells-Newton Nat. Corp. (D.C.), 49 F. (2d) 914, 917.

Eastern Products Corp. v. Tennessee Coal, Iron & R. Co., 170 N. Y. S. 100, 101.

Hansen v. American Security & Trust Co., 144 N. Y. S. 839, 840.

Hexter v. Day-Elder Motors Corp., 182 N. Y. S. 717, 718, 720.

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Mason v. Red River Lumber Co. (D. C.), 21 F. Supp. 438.

Wollman v. Newark Star Pub. Co., 179 N. Y. S. 899.

Judge Cavanah correctly analyzed the law in his opinion, (Tr. 127-129).

An excellent analysis of cases was made in Creager v. P. F. Collier & Son, Inc., 36 Fed. (2d) 783.

We find no Idaho case which is precisely in point. However, the Idaho Supreme Court did italicize in the

case of Boise F. Service v. General M. Accept. Corp., 55 Idaho 5, 36 Pac. (2d) 813, in a case cited by appellant (Appellant's Brief 18-46), where service was made on a foreign corporation by serving the County Auditor, as follows, page 16 Idaho report:

> "It is thus made to appear that at the *time* of the commencement of the action, as well as at the *time* of service of summons, and prior thereto, respondent was *present* in this state, transacting business, by and through a local representative * * *."

Appellant nowhere in its brief claims that the tort which is so indefinitely set up in its complaint occurred in Idaho.

Appellant does not claim that Lewis was ever in Idaho or made any representation or option or lease in the State, and the fact is Lewis never was in Idaho (Tr. 60), but made the agreement in 1931 when, of course, he was not in the state (Tr. 124), nor is there any claim that the fraudulent option or agreement was entered into in Idaho or that appellees officers who alone could make such an agreement were ever in this state.

It seems clear to us that the appellee was not present in the state at the time the action was begun, nor since February, 1932, and therefore this case comes squarely within the rule which we have above cited and which was followed by the court below.

V.

THE APPELLANT COMPLAINS THAT WHEN IT SOUGHT TO REMAND THE CASE AFTER THE MOTIONS TO QUASH HAD BEEN SUSTAINED, THE LOWER COURT DISMISSED INSTEAD OF REMANDING.

The lower court, May 5, 1938, quashed the service of summons and complaint (Tr. 130). June 13, 1938, the appellant sought remand of the case to the state court (Tr. 132). After hearing the motion to remand was denied and the case was dismissed.

28 U. S. C. A. para. 80 sec. 37 provides that if, in any suit removed from a state court to a United States District Court, it shall appear to the satisfaction of the federal court that "* * * such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court * * *" the court shall "dismiss the suit or remand it to the court from which it was removed, as justice may require and shall make such order as to costs as shall be just".

The statute was passed upon in Employers Reinsurance Corp. (CCA 5), 82 Fed. (2d) 373, and on appeal to the Supreme Court, 299 U. S. 374, 81 L. Ed. 289, this comment was made:

> "In the circumstances already recited the district court was required to dismiss the suit for want of jurisdiction or to remand it to the state court from which it had been removed, and in selecting between these alternatives the court was required to act 'as justice may require.' The statute assumes that

> justice will be better served in some instances by a dismissal and in others by a remand. Making the required selection involves discretion—judicial discretion, and mere choice. Plainly the circumstances in which the court acted pointed to a remand as being in justice, the more appropriate of the alternatives."

The facts in that case very clearly afforded the District Court an opportunity to do justice because when the case was filed in the State Court service was made upon an agent of the foreign corporation defendant who was not authorized to receive service. The Federal Court on the defendant's special appearance to quash the service sustained that motion. Thereupon another summons was issued out of the Federal Court and served upon the authorized agent. This time the defendant appeared specially and moved to quash on the grounds that the special agent was in the Western District of Texas while the suit was removed to the Eastern District, and therefore the Eastern District Court did not have territorial jurisdiction of the defendant since the service was made in the Western District. Of course, the Federal Court quashed that service. By this time the statute of limitations had run against the original action and on application of the plaintiff, the court being impressed with the fact that if the case were dismissed a new action could not be started, to save the loss of a right to sue sent the case back to the State Court for the reason that out of the State Court could issue process which could be served upon the agent of the foreign corporation who lived in the Western District of Texas. It was very clear that the State Court had

jurisdiction all over the State of Texas and process issuing out of it could be served either in the Eastern or Western District. There was no question whatever that the foreign corporation was doing business in Texas, and had the plaitiff served the authorized agent, that service would have been good, and by the same reasoning after the Federal Court had found it did not have jurisdiction first, because the person served was not an agent, and then in the second attempt because the Eastern District Court did not have territorial jurisdiction in Western Texas, the case could still be sent back to the State Court and it could issue process which could then be served upon the proper agent of the defendant who lived in Texas. Now in that case there seems to be a real reason for use of the discretion of the Federal District Court, and the defendant certainly could have no real objection because it was actually present in the State of Texas and regular service could be had upon it. If the Federal Court had dismissed the case then because the statute of limitations had run, the plaintiff would have lost its chance to try its case.

Now turning to this case we find that the court decided that service had not been made. If this case had been remanded to the state court, it would have availed the appellant nothing. There was no showing made with the motion to remand that the appellee could be found in Idaho or that conditions changed since the lower court held the defendant was within this jurisdiction. No affidavits or evidence of any kind was brought forward to show

that the appellee could be served, and in the absence of such showing it must be assumed, we believe, that the condition which the court found to exist "absence of appellee from the State of Idaho" continued at the time of the motion to remand and therefore no service could have been had had the case been sent back to the state court.

In this connection we call attention to the fact that the summons was originally issued in the state court in February, 1937, and if it were sent back a new summons that would be issued would be over a year from the date of the commencing of suit in the state court and the issuing of summons therefrom. This cannot be done because the statutes of Idaho, Section 5-502 provides:

> "Issuance of summons.—At any time within one year after filing the complaint the plaintiff may have one or more summons issued."

Under this section a summons may not be issued after the expiration of a year. This has been held under the identical California Act of 1860 from which our Idaho Act was taken. The California Act was amended, but the Idaho Act is the same as the original California Act and has never been amended.

In the case of Dupuy v. Shear, 29 Cal. 238, the question there arose whether a summons issued more than one year after the filing of the complaint constituted the basis of a legal service, and the defendant moved to set aside the summons as improvidently issued and to strike the complaint from the files of the court for want of prosecution. The motion was granted by the lower court and the Supreme Court of California affirmed the decision.

"The summons vacated was issued long after the time limited, and, therefore, not in pursuance of its provisions.

"* * * A summons thereafter to be issued, as a matter of absolute right, must issue by virtue of the provisions of the section as amended, * * *."

The question was again brought up in Reynolds v. Page, 35 Cal. 296, and more pointedly decided. The complaint there was filed on the 20th of August, 1862, and four years afterwards the summons was issued and a motion by the defendant to dismiss was granted. The court said:

"Before the amendment of 1860 (which makes the original California statute of the exact wording of the Idaho statute), the summons might be issued at any time after filing the complaint; but, by the amendment of that year, it could only be issued within a year. It was, doubtless, found that to permit the summons to be issued at any time, without limitation, enabled plaintiffs to indefinitely extend the statute of limitations. At all events, the amendment was adopted, and it was evidently the intention to require parties to proceed with their litigation within a reasonable time—to place themselves, at least, in a condition to effect a service of process. And we think the summons not issued, within the meaning of the act, till all the papers essential to enable the plaintiff to make a valid personal service on the defendants, duly attested, are placed at his disposal. In this case, there was no summons issued within the meaning of the act, and no attempt at service, till nearly four years after the filing of the complaint—no summons issued within the year, and none is authorized to be issued after the expiration of the year—and we think the action properly dismissed."

It is, therefore, clear that even though there was not the fatal and final objection to the service of summons here, that the defendant is not within the State of Idaho, and therefore canot be served, there is no ground for the issuance of another summons out of the State District Court because the summons that was issued within the year was held improperly served and another summons cannot be issued out of the State Court and the suit would be dismissed there.

Section 5-504 I. C. A. provides:

> "Another summons.—If the summons is returned, without being served on any or all of the defendants, or if it had been lost, the plaintiff may have another summons issued *within such time as the original might have been issued.*"

The part of the statute which we have italicized seems to us to further clench the point that even though the case were sent back, another summons cannot be issued.

The appellant was unable to reach the defendants with the process of the federal court in Idaho and he would be unequally able to reach them with the process of the state courts of Idaho—it will be borne in mind that the district court for the District of Idaho is coextensive with the boundaries of the state.

Appellant has suggested that in any event the dismissal should have been made without prejudice—the order appears on page 134 of the transcript and shows that it was not dismissed with prejudice.

## MINOR POINTS.

Several minor points are raised which we think can be shortly answered.

### Dismissal For Want Of Jurisdiction Does Not Carry Costs.

The answer is obvious for the statute authorizing dismissal, 28 U. S. C. A., Section 37, paragraph 80 plainly provides that the court can "* * * make such order as to costs as shall be just."

In one of the cases cited by appellant, Phoenix Butts Gold Mining Co. v. Winstead, 226 Fed. 863 (Appellant's Brief, 59), the court found that the granting of costs was a matter for its discretion.

### The Defendant, Alexander Lewis, Did Not Join In The Petition For Removal.

Defendant Lewis was never lawfully served with summons at any time—he was a resident of New York and at the time the petition for removal was filed, February 27, 1937 (Tr. 13) there was no return of service on file. The record showed only an attempted service on one defendant, the appellee. One defendant under those circumstances can remove.

Kelly v. Alabama-Quenelda Graphite Co., 34 Fed. (2d) 790.

Hunt v. Pearce, 284 Fed. 321.

Bowles v. H. J. Heinz Co., 188 Fed. 937.

DEFAULT SHOULD NOT HAVE BEEN SET ASIDE FOR THE MOTION TO SET ASIDE SERVICE OF SUMMONS WAS NOT ACCOMPANIED BY THE CERTIFICATE OF AN ATTORNEY THAT HE BELIEVED IT WELL FOUNDED IN LAW.

We suggest this contention answered by quotation from Rule 13 of U. S. District Court for Idaho:

> "Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay."

The motion to quash the service of summons and complaint was signed by Hawley & Worthwine and was verified individually by Jess Hawley and filed in the state court and the rules of the federal court did not apply to it. The motion to quash filed in the federal court was signed by one of the attorneys as well as by the firm name (Tr. 95). This was also true of the supplementary motion (Tr. 117).

## CONCLUSION.

We respectfully advance that the appellant is not entitled to a reversal of this case.

Respectfully submitted,
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